Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

KARIM SALEHPOOR, PETITIONER

v.

MOSHEN SHAHINPOOR; KEYKHOSROW FIROOZBAKHSH; DAVID E. THOMPSON; REGENTS OF THE UNIVERSITY OF NEW MEXICO; AND RANDY G. BOEGLIN, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DENNIS W. MONTOYA
Counsel of Record
MONTOYA LAW, INC.
1822 Lomas Boulevard, NW
Albuquerque, NM 87104
(505) 246-8499
(505) 246-8599 (Facsimile)
Attorney for Petitioner

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦ USSCINFO.COM

QUESTIONS PRESENTED

- Whether the First Amendment to the United States Constitution protects the right of an Iranian graduate student studying in the United States to complain that his original doctoral thesis research material, which was highly regarded by an agency of the United States government, was illicitly diverted to the Islamic Republic of Iran, where it might be used in possible weapons applications?

- Whether the First Amendment to the United States Constitution protects the right of a graduate student to complain of fraud and corruption in the handling of his doctoral thesis research material?

- Whether de novo review of First Amendment issues requires something other than mere appellate court recital and adoption of findings made by the trial court?

- What is the due process to which a graduate student at a public institution is entitled in disciplinary and academic proceedings having grave import to the student's academic career?

PARTIES TO THE PROCEEDING

In addition to the individually-named defendants/appellees, Environmental Robotics, Inc., a closely-held corporation believed to be wholly owned by defendant Mohsen Shahinpoor and his wife, Jamileh Farahmand, was a party to the proceedings below.

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The opinion of the United States Court of Appeals for the Tenth Circuit is set forth in the Appendix (App.) p. 1a. The two decisions of the United States District Court for the District of New Mexico are set forth at App. p. 16a and App. p. 28a.

STATEMENT OF JURISDICTION

On June 11, 2002, the trial Court entered its Memorandum Opinion and Order granting defendants Keykhosrow Firoozbakhsh, David E. Thompson, University of New Mexico, and Randy G Boeglin's motion and to dismiss for failure to state a claim and on the basis of qualified immunity, and dismissed the case as to these defendants.

The trial Court entered its Memorandum Opinion and Order Dismissing the case as to Defendant Shahinpoor on October 21, 2002. The second Memorandum Opinion and Order effectively ended the case, as it also dismissed out Defendant Environmental Robots, Inc., Defendant Shahinpoor's company. By agreement with Environmental Robots, Inc., the corporation plays no role in the appeal or in this petition for writ.

Plaintiff/Appellant filed his Notice of Appeal on October 31, 2002. Appeal to the United States Court of Appeals for the Tenth Circuit followed. After full briefing and oral argument, the Tenth Circuit filed, on February 18, 2004, its decision affirming the lower court.

This petition for a writ of certiorari to the 10th Circuit Court of Appeals follows. The United States Supreme Court has jurisdiction to review the case under 28 U.S.C. §1254.

STATUTES INVOLVED

The statutes involved in this case include 42 U.S.C. §1983. That statute reads in its entirety as follows:

> § 1983. Civil action for deprivation of rights
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia

shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Appellant, **KARIM SALEHPOOR**, was a Ph.D. student in Mechanical Engineering at the University of New Mexico (hereinafter "UNM") Mechanical Engineering (ME) Department from August 1994 until July 1997. After he passed his proposal defense in July of 1997, Appellant became a Ph.D. candidate. Defendant **MOHSEN SHAHINPOOR** was a professor in the Mechanical Engineering Department of UNM. Defendant SHAHINPOOR was Appellant's academic advisor at UNM. Defendant **KEYKHOSROW FIROOZBAKHSH** was a visiting professor at the Orthopedic Department of the University of New Mexico Hospital (hereinafter "UNMH"). Defendant **DAVID E. THOMPSON** was the Chairman of the Mechanical Engineering Department at UNM, and he was also a member of the Ph.D. dissertation committee for Appellant. Defendant **RANDY G. BOEGLIN** was the Dean of Students at UNM. Appellant's Ph.D. dissertation research was in the field of the mechanism for electrical actuation of artificial muscles. Appellant's Ph.D. dissertation research was funded by the National Aeronautics and Space Administration (hereinafter "NASA") Jet Propulsion Laboratory and by Sandia National Laboratory. NASA had planned the use of artificial muscles as part of a "shield wiper" for the next planned mission to the planet Mars. Appellant joined the Ph.D. program at the UNM Mechanical Engineering Department in the Fall of 1994. Mr. Salehpoor began his dissertation research on the mechanism of actuation for

electrically controllable Nafion Artifical Muscles (hereinafter "NAM"). NAM had been introduced to the scientific community in 1992 by a group of Japanese researchers. However, a mechanism for actuation of NAM had not been elucidated at the time of Appellant's Ph.D. research.

The Jet Propulsion Laboratory (hereinafter "JPL") at NASA had funded research at UNM into NAM in anticipation of using these devices in their next Mars Mission. Defendant SHAHINPOOR acquired the procedure for processing NAM as developed by the Japanese researchers, and filed for a patent on this device under the auspices of UNM. Appellant, through his research, acquired a critical understanding of the actuation mechanism for NAM, thereby attaining the capability of processing artificial muscles with a much larger force capacity. Appellant also developed the ability to process Dry Nafion Artificial Muscle (hereinafter DNAM) capable of functioning outside of a liquid medium (i.e., in dry air), and thus of critical importance for Mars Missions. Previously-developed NAM were capable of functioning only in water medium, and lost their capability to function rapidly when activated in air.

Mr. Salehpoor's version of NAM, with its impressive performance and together with Appellant's explanation of the actuation mechanism, attracted public and media attention, thus enabling defendant SHAHINPOOR to obtain approval from UNM to establish the Artificial Muscle Research Institute (hereinafter "AMRI"). As a result of his valuable scientific contributions, UNM and NASA – JPL supported Appellant's application for Permanent

Resident status in the United States, based on the National Interest Waiver. Dr. Yoseph Bar-Cohen, the NASA-JPL Principal Investigator, had been receiving NAM from UNM, sent by Defendant SHAHINPOOR, for NASA-JPL experiments. Later Bar-Cohen wanted Appellant to join a group of NASA researches to show them how to process NAM. On June 16, 1997, Defendant SHAHINPOOR and Appellant traveled to Pasadena, California, to meet with NASA researchers at JPL. Because he was a foreign student with an F-1 visa, Appellant was not allowed by JPL security to enter the laboratory area at JPL. Mr. Salehpoor returned to Albuquerque. However, Defendant SHAHINPOOR remained overnight at JPL to share the process and the actuation theory with JPL researchers. Because of his lack of knowledge in the subject matter, SHAHINPOOR was of little help to the NASA researchers.

About two weeks after this incident, Dr. Bar-Cohen and three other NASA researchers traveled to Albuquerque to meet with Mr. Salehpoor to obtain a greater understanding from him with regards to the NAM research. On July 14, 1997, Dr. Bar-Cohen expressed NASA – JPL's deep interest in Appellant's doctoral research through an e-mail. Later, when Appellant applied for his "green card" based on the National Interest Waiver, Dr. Bar-Cohen demonstrated through an impressive letter to the United States Immigration and Naturalization Service ("INS") Appellant's critical role in JPL's Mars Mission project. On July 16, 1997, Appellant presented the mechanism for actuation of NAM in his Ph.D. dissertation proposal.

On January 8, 1998, Mr. Salehpoor submitted the documentation required for graduation to the Office of

Graduate Studies at UNM. Appellant's initially proposed date for graduation was May of 1998. On March 12, 1998, the UNM Mechanical Engineering Department submitted the announcement of Appellant's final examination to the Dean of Graduate Studies. Because Mr. Salehpoor missed the deadline for May 1998 graduation, defendant SHAHINPOOR signed another Notification of Intent to Graduate for summer of 1998.

Appellant submitted his dissertation to Dr. Shahinpoor on May 2, 1998. Prior to his defense of his Ph.D. thesis, Mr. Salehpoor discovered and reported to responsible authorities of UNM that Defendants SHAHINPOOR and FIROOZBAKHSH had used Appellant's Ph.D. dissertation proposal, which had been fully funded through United States federal grant monies, in a thesis presented in Tehran, Iran. This thesis was submitted by one Mohsen Shavandi to Sharif University of Technology in Tehran for a master's degree in mechanical engineering. Defendant FIROOZBAKHSH served as academic advisor to Mohsen Shavandi.

Defendant SHAHINPOOR also used the contents of Mohsen Shavandi's thesis, which was substantially identical in significant part of its substance to Mr. Salehpoor's doctoral dissertation proposal, as a basis for his report for a grant he had obtained for his private company, defendant **ENVIRONMENTAL ROBOTS INCORPORATED.**

Appellant thereafter submitted multiple grievances to the Dean of the School of Engineering at UNM, complaining of Defendant SHAHINPOOR's conduct and that of certain other Defendants in this case. Defendant SHAHINPOOR thereafter began a course of

offensive, prejudicial conduct towards Appellant and Appellant's Ph.D. dissertation program. On May 9, 1998, SHAHINPOOR wrote in his first set of comments on Appellant's dissertation that "this dissertation is far from satisfactory."

Appellant scheduled his final dissertation defense meeting for May 26, 1998. On May 21, 1998, Defendant SHAHINPOOR cancelled Appellant's dissertation defense meeting. On May 26, 1998, SHAHINPOOR wrote to Appellant, stating that he could finish off "in a month or so," but then on May 29, 1998, SHAHINPOOR completely and unfairly criticized the quality of Appellant's Ph.D. dissertation.

On June 10, 1998, SHAHINPOOR terminated Appellant's dissertation committee. On June 23, 1998, SHAHINPOOR removed Appellant's name from the door to Appellant's office. Also on June 13, 1998, SHAHINPOOR broke into Appellant's office and desk drawer and took research materials that Appellant was using. On July 8, 1998, SHAHINPOOR stated that he did not know how long it would take Appellant to finish his work, and further stated that Appellant's research was not yet complete. On August 21, 1998, in the wake of multiple hostile acts and omissions against him by Defendant SHAHINPOOR, Appellant requested to be assigned a temporary academic advisor while his grievance was under consideration.

Defendant DAVID E. THOMPSON, despite knowing and having reason to know the basis for Appellant's grievances, denied Appellant's request for a temporary advisor. Thereafter, Defendant THOMPSON actively collaborated and supported Defendant

SAHLEPOOR by ordering, on September 23, 1998, that Appellant vacate his second office by September 28, 1998. On this same date, Appellant received another e-mail from the Secretary of the Department, Arden Ballantine, to the same effect.

Despite his having granted Appellant until September 28, 1998, to vacate his office, Defendant THOMPSON ordered the occupation of the office on September 23, 1998, the same day that he issued Appellant notice to vacate. Thereafter, UNM through responsible management officials, denied Appellant information he requested on academic research fraud, refused to acknowledge Appellant's intellectual property interest in his own doctoral research, forced Appellant to do a second proposal defense and proposal research with a different advisor to obtain his Ph.D., deprived him of essential administrative information that Appellant needed to register for his dissertation with his new advisor, and ultimately expelled Appellant from UNM on December 21, 1998. UNM, through responsible management officials, including the named Defendants herein, engaged in numerous additional acts and omissions against Appellant. One of an especially high degree of significance is the refusal on the part of Defendant RANDY G. BOEGLIN, UNM Dean of Students, to process Appellant's request for a permit to protest against his expulsion. Instead of processing Appellant's request, Defendant BOEGLIN issued another letter of expulsion to Appellant on December 21, 1998, without ever having met with Appellant or afforded him a hearing of any kind. Ultimately, Defendant BOEGLIN barred Appellant from the UNM campus. Defendant Thompson also expelled the

Appellant through a second letter on the same day, December 21, 1998.

On 5 December 2001, defendants Keykhosrow Firoozbakhsh, David E. Thompson, University of New Mexico, and Randy G Boeglin filed their motion and memorandum in support of motion to dismiss for failure to state a claim and on the basis of qualified immunity. On December 25, 2001, Mr. Salehpoor filed his Response. On January 9, 2002, Defendants/Appellees Firoozbakhshsh, Thompson, University of New Mexico and Boeglin filed their Reply. On June 11, 2002, the Court entered its Memorandum Opinion and Order granting these Defendants' motion and dismissing the case as to them.

On July 30, 2002, Defendant Shahinpoor filed his Motion to Dismiss on the basis of the "law of the case doctrine." On September 22, 2002, Mr. Salehpoor filed his Response. Mr. Shahinpoor filed his Reply on October 4, 2002. The Court entered its Memorandum Opinion and Order Dismissing the case as to Defendant Shahinpoor on October 21, 2002. The second Memorandum Opinion and Order effectively ended the case, as it also dismissed out Defendant Environmental Robots, Inc., Defendant Shahinpoor's company. By agreement with Environmental Robots, Inc., the corporation plays no role in this appeal.

Plaintiff/Appellant filed his Notice of Appeal on October 31, 2002. Appeal to the United States Court of Appeals for the Tenth Circuit followed. After full briefing and oral argument, the Tenth Circuit filed, on February 18, 2004, its decision affirming the lower court.

This petition for a writ of certiorari to the 10th Circuit Court of Appeals follows.

REASONS FOR GRANTING THE WRIT

A. THIS COURT SHOULD ACCEPT CERTIORARI IN THIS CASE TO ELUCIDATE THE LEGAL STANDARD AS TO DUE PROCESS IN THE ACADEMIC SETTING

The United States Supreme Court has ruled that a student in a public institution, such as the University of New Mexico in the case at bar, is entitled to due process before being expelled. *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). This legal principle is not subject to serious challenge. See *Rustad v. United States Air Force/Air Force Academy*, 718 F.2d 348, 351 (10th Cir. 1983)(dissenting opinion by Judge McKay). The extent of the procedural protections required must be measured by the particular situation. *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 902, 46 L.Ed.2d 18 (1976); *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). That analytical process requires consideration of three factors: (1) the private interest that will be affected; (2) the risk that the procedure employed might cause an erroneous deprivation of that interest and the probable value of additional or substitute procedural safeguards; and (3) the government's interest, including the governmental activity and the administrative and fiscal costs the additional procedural requirements would entail. *Mathews v. Eldridge*, 424 U.S. at 335, 96 S.Ct. at 903.

In order for such a proceeding to meet due process requirements, the requirements for a disciplinary expulsion proceeding have been outlined by the United States Tenth Circuit Court of Appeals as follows:

1. The affected student is to be given notice of charges to be raised at a disciplinary hearing;
2. The facts regarding the student's alleged misconduct are to be developed at a disciplinary hearing;
3. The student is to be given the opportunity to fully participate in the hearing and to tape record proceeding;
4. The student is to be formally advised of the disciplinary committee's decision.

Slaughter v. Brigham Young University, 514 F.2d 622; 624-625 (10th Cir. 1975) (Applying the standard for public institutions to a private university).

In this case, the Appellant was subjected to multiple adverse actions and his statement was that he was not afforded any hearing whatsoever.

B. THIS COURT SHOULD GRANT CERTIORARI TO ELUCIDATE THE LEGAL STANDARD AS TO THE EXERCISE OF FIRST AMENDMENT RIGHTS

In *Luethje vs. Peavine School District of Adair County*, 872 F.2d 352 (10th Cir. 1989), the Tenth Circuit addressed a case that, on its facts, is remarkably similar to Mr. Salehpoor's situation. In *Luethje*, the School Board adopted a rule prohibiting school employees from "tak[ing] any school problems other places, or discuss it

[sic] with others." 872 F.2d at 353. Specifically, the Plaintiff in *Luethje* had "complained to the principal, school board, and state and county health departments about what she considered unsanitary practices in the cafeteria, which included the serving of spoiled food to children, and the school's refusal to do anything about them." Id. The Tenth Circuit concluded that

> ...[W]e are satisfied that, reasonably construed in light of the events that gave rise to it, the rule was intended to be a prior restraint on Plaintiff's complaints, which we hold were speech of public concern, and was broad enough to prohibit other speech of public concern. It prohibited the cafeteria employees from talking to anyone but the principal about "school problems," and impliedly threatened adverse employment action for breach. It is unnecessary for Plaintiff to establish that no court would have given a sufficiently narrowing construction to the rule to render it constitutional. *Cf. Grayned v. City of Rockford*, 408 U.S. 104, 110, 92 S.Ct. 2294, 2300, 33 L.Ed.2d 222 (1972) (not within federal court's power to construe and narrow state laws). Finally, we hold that defendants' interest in efficient functioning of the school did not override Plaintiff's First Amendment rights to the extent necessary to justify the rule the board adopted. Id. at 354-355.

The Tenth Circuit's analysis in this case gave only superficial treatment to the applicability of *Luethje* in the case of Mr. Salehpoor. This Court should accept certiorari

in order to clarify the issue of First Amendment protection affordable to his speech, which was of greater significance than the issue of poor quality cafeteria food.

C. THIS COURT SHOULD GRANT CERTIORARI IN ORDER TO ELUCIDATE THE STANDARD AS TO DISCIPLINARY ACTION AGAINST STUDENTS FOR THE EXERCISE OF FIRST AMENDMENT RIGHTS

Where action against a student is taken for reasons associated with the exercise of First Amendment rights, the Courts have been especially willing to reverse the disciplinary decisions of an academic institution. *See, e.g., Trujillo v. Love*, 322 F.Supp. 1266, 1271 (D.C. Colo. 1971). Although academic institutions have the right "to prescribe and control conduct in the schools," this authority must be exercised so as not to intrude upon "fundamental constitutional rights." Id., *quoting Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 507, 89 S.Ct. 733, 737, 21 L.Ed.2d 731 (1969). Thus, in *Trujillo vs. Love*, a decision by Southern Colorado State College to suspend a college newspaper editor for reasons associated with her writings in the newspaper was reversed, and the Appellant was reinstated with back pay. 322 F.Supp. at 1271.

D. THIS COURT SHOULD GRANT CERTIORARI IN THIS CASE TO ELUCIDATE THE STANDARD AS TO LABELING FIRST AMENDMENT INFRINGEMENT AS "ACADEMIC DISCIPLINE"

The *Trujillo* court made express reference to the fact that conduct infringing on First Amendment rights could not be upheld "merely because it comes labeled as 'teaching.'" Id.; *see also Yench v. Stockmar*, 483 F.2d 820, 824 (10th Cir. 1973) (Where trial court failed to make a specific finding that the wearing of a Mickey Mouse hat at graduation was the exercise of a right of constitutional dimensions, remand for a specific finding was necessary. "An answer cannot be assumed when the record is silent.").

E. THIS COURT SHOULD GRANT CERTIORARI IN THIS CASE IN ORDER TO ELUCIDATE THE STANDARD AS TO QUALIFIED IMMUNITY IN THE ACADEMIC SETTING

"Qualified immunity protects public officials from individual liability in a § 1983 action unless the officials violated 'clearly established ... constitutional rights of which a reasonable person would have known.' "*Mick v. Brewer*, 76 F.3d 1127, 1134 (10th Cir. 1996); *Workman v. Jordan*, 32 F.3d at 478 (*quoting Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982)). The Plaintiff initially bears a two-part burden when the defendant pleads the defense of qualified immunity. *Albright v. Rodriguez*, 51 F.3d 1531, 1534 (10th Cir.1995). The Plaintiff must show (1) "that the defendant's actions violated a constitutional or statutory right," and (2) that the right "allegedly

violated [was] clearly established at the time of the conduct at issue."

DISCUSSION

THE TRIAL COURT ERRED IN GRANTING THE "UNM DEFENDANTS" MOTION TO DISMISS/FOR SUMMARY JUDGMENT

THE PLAIN LANGUAGE OF APPELLANT'S COMPLAINT STATES CLAIMS FOR VIOLATION OF DUE PROCESS

The First Amended Complaint filed in this case clearly alleges that Mr. Salehpoor was expelled from UNM "without a hearing of any kind," and that ultimately, Defendant Boeglin barred Appellant from the university campus. First Amended Complaint, ¶¶ 71 and 72. This is clearly insufficient to satisfy even the most minimal of due process requirements. *See Slaughter v. Brigham Young University.* Given the "powerful presumption" against dismissal for failure to state a claim, see *Maez vs. Mountain States Telephone and Telegraph, Inc.*; Mr. Salehpoor's claim as to violation of due process clearly survives.

THE PLAIN LANGUAGE OF APPELLANT'S COMPLAINT STATES A CLAIM FOR FIRST AMENDMENT VIOLATION

In his First Amended Complaint, Mr. Salehpoor details the unauthorized transfer of his Ph.D. dissertation research to a foreign university, where it was used, without acknowledging Appellant as its originator, in a Master's Degree thesis. (First

Amended Complaint, ¶¶50-52. Appellant also asserts that Defendant Mohsen Shahinpoor utilized the same research in applying for a federal grant through his private company, Defendant Environment Robots, Inc. Id., ¶53. Appellant's First Amended Complaint then goes on to relate that, once he discovered these violations and complained of them to university officials, "Defendant SHAHINPOOR began a course of offensive, prejudicial conduct towards Appellant and Appellant's Ph.D. dissertation program." (Id., ¶¶ 54-55) The remainder of the First Amended Complaint's factual allegations details the progressively more hostile actions of Shahinpoor and other defendants that followed Appellant's exercise of his First Amendment rights and culminated in the termination of Appellant's Ph.D. program and his expulsion from UNM. (Id., ¶¶) These allegations clearly form the basis for a claim of First Amendment violations.

Appellant's expression of concern was not limited in its scope to his own private interests. That the unauthorized transfer of technology to Sharif University of Technology in Tehran is a matter of general public concern in this country seems to be a matter beyond speculation, of which the Court should be free to take judicial notice. *See generally* Cicippio v. Islamic Republic of Iran, 30 F.3d 164, 167-68 (D.C.Cir.1994) (Case involving suit by former hostages against the government of Iran. Opinion includes discussion of freezing of Iranian government's assets in the United States); *See also*, Falkenrath, Richard A., Robert D. Newman, and Bradley A. Thayer. *America's Achilles' Heel: Nuclear, Biological, and Chemical Terrorism and Covert Attack*. Cambridge, Mass.: The MIT Press, 1998. The Federal Bureau of Investigation, Denver

Division, Foreign Counterintelligence Division, posted the following statement on the internet during the period of time when Appellant/Appellant was briefing his response to the UNM Defendant's Motion to Dismiss, at http://www.fbi.gov/contact/fo/denver/fci.htm. (The "URL" address has since been changed to http://denver.fbi.gov/fci.htm. A copy of the webpage appeared in the Appendix presented in the appeal to the Tenth Circuit, including the following text:

> The FBI is the lead investigative agency in countering the threat posed by hostile intelligence services operating within the United States. Although the "Cold War" officially ended in the late 1980's, intelligence gathering activities by foreign governments within this country have actually increased. The type of information sought has expanded from the classic military secrets to a wide variety of areas including new and emerging communication and computer technologies, medical and pharmaceutical research, economic data and trends, etc.
>
> How are these foreign countries attempting to gather this information? A variety of methods are being used. One of the most often used methods is sending highly trained, professional intelligence officers to the United States posing as diplomats, students, visitors and businessmen. Considering the huge number of individuals who come to this country every year, it is a daunting task

> for the FBI to determine which people are here for legitimate purposes and which came to this country for the purpose of intelligence gathering activities.
>
> Another favorite method is the use of "cooptees". A cooptee is an individual who is not a trained intelligence officer but is directed to gather information on behalf of their respective governments. Often these individuals are forced to perform these tasks as a condition for allowing them to travel overseas, in exchange for government financial assistance in their education, or due to threats against family members who remain back in their home countries. Even though these individuals are not career intelligence officers, because of their access to information of value, they can cause significant damage to the United States. (Emphasis added)

The public interest aspect of the diversion to a foreign power of original scientific research in which the National Aeronautics and Space Administration had expressed keen interest, and for which Appellant had been granted Permanent Resident Alien status under the "public interest" waiver, could not be more evident.

Similarly, the possibly fraudulent use of scientific research in applying for United States government grant monies is clearly a topic of general public concern.

To what extent do the facts of Karim Salehpoor's case, in which he complained of his mistreatment and

the illegal diversion of his independent and unique (i.e., proprietary) scientific research and techniques to another university in a foreign country and the misuse of his scientific research differ from the facts in *Luethje*? The cases differ only in two material respects: *Luethje* involved a civilian school district, while Mr. Salehpoor's case involves a university; and *Luethje* involved only the implied threat of disciplinary action in retaliation for the exercise of First Amendment Rights, while Mr. Salehpoor's case involves not only the imposition of retaliatory sanctions, but an intensified effort to damage his reputation and to silence him from speaking out.

It is reasonably apparent from the context and the timing of the actions taken against Mr. Salehpoor in this case, and the express language of many of the documents that form the foundation of this case, viewed in light of the surrounding circumstances as attested in Appellant's affidavit (attached and incorporated as Exhibit 1 to his response), that Mr. Salehpoor was expelled and barred from UNM solely as a result of his activities in the exercise of his First Amendment rights. *Compare* Luethje. It is also crystal clear that Mr. Salehpoor's challenged speech activities bore no direct relationship to UNM as an institute of higher learning, but instead were exclusively focused on UNM's role as the employer of Defendant Mohsen Shahinpoor, the individual directly attributed by Appellant as being responsible for the illegal acts against him. The Defendants did not argue to the trial court that they are not subject to the law recited previously herein. In effect, they argued that they were the beneficiaries of qualified immunity and unfettered discretion as the result of their academic

status. Pared to its bare essentials, this is the argument presented to the trial court and to the Tenth Circuit Court of Appeals by the Defendants. There is no reasonable argument to be made that Appellant's speech activities were not directed to "issues of public concern." *Compare Luethje.* To concede Defendants' argument is to strip away Constitutional protection from Mr. Salehpoor solely because his civil rights activities took place in the context of a Ph.D. program, instead of a school cafeteria.

MR. SALEHPOOR ALLEGED ANIMUS AGAINST HIM BASED ON HIS RACE/NATIONAL ORIGIN

Appellant's affidavit, attached and incorporated into his response by reference, clearly alleges that he was targeted in large part because of his Iranian heritage. He was treated differently from non-Iranian students. This is sufficient to overcome the UNM Defendants' argument that his claim of conspiracy should not be allowed to proceed.

MR. SALEHPOOR PRESENTED TO THE TRIAL COURT ADDITIONAL EVIDENCE IN SUPPORT OF HIS CLAIMS THAT HAD EMERGED WITH EARLY DISCOVERY

Appellant had the benefit of voluminous Rule 26 disclosures in this case, and with those disclosures emerged significant new evidence in support of his claims. Attached and incorporated by reference into his response to the UNM Defendants Motion to Dismiss was the Affidavit of Karim Salehpoor, the Appellant. Appellant's affidavit made reference to various items of

evidence that had emerged with early discovery and makes clear the following points:

1. There is ample evidence to refute the UNM Defendants' assertions that this case is about Mr. Salehpoor's academic performance. At most, that is a "jury question;"

2. There is ample evidence that Defendant Mohsen Shahinpoor acted for retaliatory and vindictive reasons against Appellant for the exercise of his First Amendment rights. One of the most salient examples of this is an e-mail dated 22 November 1998, authored by Defendant Shahinpoor in which he made direct reference to Appellant's First Amendment protected activity and urges retaliatory action against Appellant;

3. There is ample evidence to refute the UNM Defendants' assertions that Appellant cannot show sufficient facts to establish a conspiracy;

4. There is ample evidence to show that Appellant was deprived of important Constitutional rights;

5. There is ample evidence indicating that Appellant's claims of Failure to Train and Supervise are sustainable;

6. There is ample evidence indicating that Appellant's exercise of his First Amendment rights in protesting the usurpation and unauthorized transfer of technology that he developed in his Ph.D. research to Sharif University of Technology in Tehran is a topic of general public interest and concern.

THE UNM DEFENDANTS ARE NOT PROPERLY THE BENEFICIARIES OF QUALIFIED IMMUNITY

The UNM Defendants in this case violated Appellant's rights that were clearly established in law many years before the events giving rise to this litigation took place. A wealth of evidence indicates that the Defendants were specifically concerned about Appellant's litigation rights, and wished to force him to give up those rights and "repent." Appellant more than met his burden of coming forward to show this. *Albright v. Rodriguez.* This evidence alone tends to indicate, not only that the UNM Defendants *should have known* of Appellant's rights were being violated, but that they *did, in fact* have this knowledge. Under these circumstances, the UNM Defendants were not entitled to qualified immunity. See *Mick v. Brewer*; *Workman v. Jordan; Albright v. Rodriguez.*

THE TRIAL COURT ERRED IN GRANTING DEFENDANT SHAHINPOOR'S MOTION TO DISMISS/FOR SUMMARY JUDGMENT, AND THE TENTH CIRCUIT COURT OF APPEALS ERRED IN FAILING TO OVERTURN THIS RULING

APPELLANT SALEHPOOR STATED A VALID CLAIM AGAINST DEFENDANT SHAHINPOOR FOR VIOLATION OF HIS FIRST AMENDMENT RIGHTS

The trial court, in ruling on the UNM Defendants' Motion, converted their motion to dismiss into one for summary judgment. (Memorandum Opinion of June 11, 2002, App. p. 18a) The court also clearly reached Mr. Salehpoor's First Amendment retaliation claims. (Memorandum Opinion of June 11, 2002, App. p.

16a) However, the trial court disagreed that Mr. Salehpoor's concerns related to a "matter of public concern" sufficient to trigger First Amendment analysis. (Memorandum Opinion and Order of June 11, 2002, App. p. 16a) The Tenth Circuit Court of Appeals agreed with this analysis. (App. p. 1a) This result is contrary to the law laid down by the Tenth Circuit in the intervening case of *Chandler vs. City of Arvada*, 292 F.3d 1236 (10th Cir. 2002). Karim Salehpoor's allegations in this regard clearly form the basis for a claim of First Amendment retaliation against Defendant Shahinpoor.

Appellant's expression of concern were not limited in its scope to his own private interests, as was discussed in his Response to the UNM Defendants' motion, which discussion is herein incorporated by reference.

The public interest aspect of the diversion to a foreign power of original scientific research in which the National Aeronautics and Space Administration had expressed keen interest, and for which Appellant had been granted Permanent Resident Alien status under the "public interest" waiver, could not be more evident.

Similarly, the possibly fraudulent or illegal use of scientific research in applying for United States government grant monies is clearly a topic of general public concern. *See, e.g., Cicippio v. Islamic Republic of Iran*, 30 F.3d at 167-68 (D.C.Cir.1994) (Discussion of possibly illegal motives of the government of Iran); *Sadeghi v. INS*, 40 F.3d 1139, 1143 (Dissent by Judge Kane) (Discussion of allegations of systematic human

rights violations by the Islamic Republic of Iran).

The Court is also free to take judicial notice of the President of the United States' recent characterizations of the government of the Islamic Republic of Iran as part of an "axis of evil" that "aggressively pursues these weapons [of mass destruction] and exports terror, while an unelected few repress the Iranian people's hope for freedom." State of the Union Address, January 29, 2002, George W. Bush, President of the United States of America; *see also, e.g.*, Weisman, Steven R., "Iran Is Going Ahead With Nuclear Plant, Despite U.S. Concerns," The New York Times, December 25, 2002, Wednesday, Late Edition – Final; Weisman, Steven R., "International, and Nuclear, Iran," The New York Times, December 29, 2002, Sunday, Late Edition – Final.

To what extent do the facts of Karim Salehpoor's case, in which he complained of the illegal diversion of his independent and unique (i.e., proprietary) scientific research and techniques to another university in a foreign country and the misuse of his scientific research differ from the facts in *Luethje*? The cases differ only in two material respects: *Luethje* involved a school district, while Mr. Salehpoor's case involves a university; and *Luethje* involved only the implied threat of disciplinary action in retaliation for the exercise of First Amendment Rights, while Mr. Salehpoor's case involves not only the imposition of retaliatory sanctions, but an intensified effort to damage his reputation and to silence him from speaking out.

It is reasonably apparent from the context and the timing of the actions taken against Mr. Salehpoor in this case, and the express language of many of the documents that form the foundation of this case, viewed in light of the surrounding circumstances as attested in Appellant's affidavit (attached and incorporated as Exhibit 1 to Appellant's Response), that Mr. Salehpoor was expelled and barred from UNM solely as a result of his activities in the exercise of his First Amendment rights. *Compare Luethje.* It is also crystal clear that Mr. Salehpoor's challenged speech activities bore no direct relationship to UNM as an institute of higher learning, but instead were exclusively focused on UNM's role as the employer of Defendant Mohsen Shahinpoor, the individual directly attributed by Appellant as being responsible for the illegal acts against him.

To the extent that the trial court might have disagreed or found the evidence to be more persuasive on the side of defendant Shahinpoor, the court was required to consider that this matter was presented in the context of a motion to dismiss. In this context, even though the court may have felt strongly that Mr. Salehpoor should not be allowed to have his day at trial, and even though the court may have felt strongly that, at the end of the day, Defendant Shahinpoor should prevail, at the juncture of a 12(b)(6) motion, the trial court was required to resolve all doubts and inferences in favor of the Appellant, Karim Salehpoor. *See, e.g., Maher v. Durango Metals, Inc.; Steele v. Thiokol Corporation,* 241 F.3d at 1252, *citing Simms v. Oklahoma ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d at 1326.

Defendant/Appellee Shahinpoor did not argue below that he was not subject to the law recited previously herein. In effect, he argued that he was the beneficiary of the "law of the case" doctrine with respect to Mr. Salehpoor's First Amendment claims because the trial court previously had entered a finding with respect to other defendants that Appellant's speech was not "protected" within the meaning of the First Amendment.

Because the trial court erred with respect to First Amendment analysis, as previously explained herein, this argument does not prevail on appeal. However, Defendant Shahinpoor's situation was also distinguishable from that of the "UNM Defendants." While other defendants in this case may or may not have been at some distance from the "action" between Appellant Salehpoor and Defendant Shahinpoor, there is no reasonable argument to be made that Appellant's speech activities were not directed to "issues of public concern" insofar as Defendant Shahinpoor is concerned. *Compare Luethje.*

More directly to the point are Defendant Shahinpoor's comments concerning Appellant's conduct in his e-mail dated 22 November 1998, authored by Defendant Shahinpoor, in which he makes direct reference to Appellant's First Amendment protected activity and urges retaliatory action against Appellant. (Affidavit of Karim Salehpoor, attached as Exhibit 1 to his Response to UNM Defendants' Motion, at ¶8(k), and Exhibit 13 to that affidavit) In his e-mail, Defendant Shahinpoor made multiple reference to Appellant's grievances and anticipated litigation or "petition" behavior and demands that Appellant

relinquish his claims as a condition precedent to his being allowed to continue as a student at UNM. Id.

There is therefore ample evidence indicating that Appellant's exercise of his First Amendment rights in protesting the usurpation and unauthorized transfer of technology that he developed in his Ph.D. research to Sharif University of Technology is a topic of general public interest and concern, and by Defendant Shahinpoor's own admission, Appellant's activities were in anticipation of litigation.

The facts of this case did not warrant dismissal of Appellant's First Amendment claims against Defendant Shahinpoor.

CONCLUSION

For all of the foregoing reasons, this Court should grant certiorari to review the important issues of law presented herein.

Respectfully Submitted,

Dennis W. Montoya
Counsel of Record
MONTOYA LAW, INC.
1822 Lomas Boulevard, NW
Albuquerque, NM 87104
(505) 246-8499
(505) 246-8599 (Facsimile)
Attorney for Petitioner

(Any footnotes will follow end of each document)

No. 02-2314

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KARIM SALEHPOOR,
Plaintiff-Appellant,

v.

MOHSEN SHAHINPOOR; KEYKHOSROW FIROOZBAKHSH; DAVID E. THOMPSON; REGENTS OF THE UNIVERSITY OF NEW MEXICO; and RANDY G. BOEGLIN, individually and in their official capacities,
Defendants-Appellees.

February 18, 2004, Filed

COUNSEL: Dennis W. Montoya of Montoya Law, Inc., Albuquerque, New Mexico, for Plaintiff-Appellant.

Daniel Joseph Macke (Elizabeth L. German with him on the brief) of Brown & German, Albuquerque, New Mexico, for Defendants-Appellees Keykhosrow Firoozbakhsh, David E. Thompson, Randy G. Boeglin, and Regents of the University of New Mexico.

Sean Olivas (Melanie Frassanito with him on the brief) of Keleher & McLeod, P.A., Albuquerque, New Mexico, for Defendant-Appellee Moshen Shahinpoor.

JUDGES: Before EBEL, McKAY, and LUCERO, Circuit Judges.

OPINION BY: McKAY

OPINION: McKAY, Circuit Judge.

Appellant Salehpoor was a Ph.D. candidate in mechanical engineering at the University of New Mexico. Appellant alleges that, prior to the defense of his dissertation, he discovered and reported to UNM authorities that his academic advisor, Appellee Shahinpoor, illegally converted Appellant's research material for the benefit of his own corporation. He also claims that Shahinpoor gave the information to a visiting professor who transferred it to a graduate student in Iran for use in that student's thesis. Appellant alleges that after he complained to the Dean of the School of Engineering about Appellee Shahinpoor, UNM Appellees n1 conspired to deny him his constitutional rights concerning the defense and completion of his dissertation. Appellant alleges that, as a result, he was constructively discharged from the Ph.D. program and barred from campus without due process.

It is important to note the exact time line of events that underlie Appellant's complaint. Appellant's initial report to UNM authorities regarding the alleged conversion of his research materials took place in May 1998 when Appellant was still considered a doctoral student. After the Spring 1998 semester, Appellant's status changed to visitor because he was no longer enrolled as a student. Aplt. App. at 178, 183. Over the course of the summer and fall, Appellant and UNM

Appellees made efforts to resolve the situation. Appellant's concerns were investigated and the Examining Committee found no merit to his allegations. Id. at 217, 225-26. After efforts to resolve the conflict failed, Appellant was barred from campus in December 1998 because his conduct had become increasingly disruptive, confrontational, and abusive. Id. at 183. Thus, even though the course of events is progressive, Appellant's complaint has two sequentially different components: 1) the initial report of the alleged conversion which took place while he was still considered a student, and 2) the ban from campus because of his behavior which took place while he was considered a visitor.

In his complaint, Appellant raised several federal and state claims, including deprivation of property without due process, conspiracy to deny him his constitutional rights in violation of § 1985, failure to adequately train and supervise, n2 whistle blowing retaliation, n3 unjust enrichment, prima facie tort, conversion, and defamation. The district court dismissed all of Appellant's federal claims against the UNM Appellees. Then, in a later order, the court dismissed all remaining federal claims, declined to exercise jurisdiction over the state law claims, and dismissed the case in its entirety.n4

On appeal, we are asked to address whether the district court erred in granting UNM Appellees' and Appellee Shahinpoor's separate motions to dismiss on the basis of qualified immunity which were construed as motions for summary judgment. "A motion to dismiss pursuant to Rule 12(b)(6) is treated as a motion for summary judgment when premised on materials outside the

pleadings, and the opposing party is afforded the same notice and opportunity to respond as provided in Rule 56." Hall v. Bellmon, 935 F.2d 1106, 1110-11 (10th Cir. 1991). Appellant, the nonmoving party, submitted all materials outside the pleadings which were considered by the district court. Neither party argues on appeal that they were not given an opportunity to respond to these materials. Therefore, the district court correctly postured its dismissal of the case as one for summary judgment. We review *de novo* the district court's grants of summary judgment. Steele v. Thiokol Corp., 241 F.3d 1248, 1252 (10th Cir. 2001).

In evaluating claims of qualified immunity, we must first determine whether "the defendant's actions violated a constitutional or statutory right." Albright v. Rodriquez, 51 F.3d 1531, 1534 (10th Cir. 1995). We then "determine whether the right was so clearly established that a reasonable person would have known that [his] conduct violated that right." Id. at 1534-35. We have held that "ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." Harris v. Robinson, 273 F.3d 927, 931 (10th Cir. 2001) (quoting Medina v. City and County of Denver, 960 F.2d 1493, 1498 (10th Cir. 1992)).

We note initially that Appellant's brief is conclusory and does not provide cogent arguments or legal authority supporting many of his claims. We will not "manufacture a party's argument on appeal when it has failed in its burden to draw our attention to the error below." Scott v. Hern, 216 F.3d 897, 910 n.7 (10th Cir.

2000) (citations and internal quotations omitted). Additionally, Appellant relies almost exclusively on the allegations on the face of his complaint in his argument that the district court erred in dismissing the case. For example, Appellant subtitles several of his argument sections as follows: "The plain language of Appellant's complaint states claims for violation of due process" and "The plain language of Appellant's complaint states a claim for First Amendment violation." Aplt. Br. at ii, 21, 22. However, as noted above, this case was correctly decided as one for summary judgment - not for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). Reference to facial assertions in a complaint are not sufficient to overcome Rule 56 summary judgment when the record as a whole reveals that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Panis v. Mission Hills Bank, N.A., 60 F.3d 1486, 1490 (10th Cir. 1995).The nonmoving party may not rest upon the mere allegations or denials of [his] pleading. The nonmoving party must go beyond the pleadings and establish, through admissible evidence, that there is a genuine issue of material fact that must be resolved by the trier of fact. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.Id. (internal citations and quotations omitted). Additionally, the section in Appellant's brief which references "additional evidence" does not provide citations to the record in support of the "ample evidence" it claims exists. Aplt. Br. at 28-29. To the extent that we can decipher Appellant's arguments on appeal, there is no support in the briefs or the record for his contentions.

Appellant's initial contention is that Appellees violated his due process rights. However, as stated by the district court, "[his] complaint is devoid of specifics regarding what due process rights were violated by [Appellees'] actions." Aplt. App. at 250. Appellant appears to be arguing that Appellees violated his substantive due process rights, but it is unclear from his briefs what substantive due process right or rights he alleges were violated. The district court, liberally construing Appellant's complaint, correctly held that Appellant had no clearly established substantive due process right to a temporary or replacement dissertation advisor, an office, or freedom from having to conduct a second dissertation defense.

Even assuming, without deciding, that Appellant had a clearly established right to continued enrollment as a doctoral student, the district court did not err in finding that Appellees' actions were not arbitrary. See Archuleta v. Colorado Dep't of Insts., 936 F.2d 483, 489 n.6, 490 (10th Cir. 1991) (majority assumed without deciding that plaintiff's property interest in enrollment was entitled to the protection of substantive due process); see also Regents of Univ. of Michigan v. Ewing, 474 U.S. 214, 227-28, 88 L. Ed. 2d 523, 106 S. Ct. 507 (1985) (majority assumed for purposes of opinion that university student had substantive property interest in continued enrollment but held that any such right was not violated because university had not acted arbitrarily in dismissing student from program). After Appellant's May 1998 report to UNM Appellees that Appellee Shahinpoor illegally converted his research materials and Appellee Shahinpoor's alleged "offensive, prejudicial conduct towards Appellant and Appellant's Ph.D. dissertation program," see Aplt. Br. at 8, the

record reflects that Appellant was given four options by the Associate Dean including: 1) leaving UNM, 2) completing his work under the direction of Appellee Shahinpoor, 3) completing a dissertation under the direction of another advisor, and 4) submitting a formal grievance. Aplt. App. at 223-24. Appellant chose to file a grievance and completed the grievance process and an appeal. He was also offered a liaison to assist in completion of his dissertation. Id. at 181-82. The record reflects that Appellees took Appellant's grievance seriously and investigated his concerns. See id. at 177-84, 221-26. It was not until December 1998, after efforts to resolve the situation had failed, that Appellant was given notice of the decision to bar him from campus for disciplinary reasons related to his behavior since the May 1998 incident and of his right to request a hearing - which he did not do. See id.

Appellant's next argument is that his complaint "alleges that [he] was expelled from UNM 'without a hearing of any kind.'" Aplt. Br. at 21. As noted by the district court, "other than setting forth generalized notions of entitlement to procedural due process . . . [Appellant] has not alleged deficiencies in the process he was afforded." Aplt. App. at 310 n.6. That Appellant's complaint facially alleges a claim for procedural due process does not provide this court with any argument or evidence that Appellant was not in fact provided a hearing or due process of any kind. Indeed, Appellees cite to evidence in the record that Appellant was not expelled. See Aplt. Br. at 178, 181, 183. Instead, he was barred from campus in December 1998 when he was no longer enrolled as a student. See id. Appellant was barred from campus for emergency reasons related to his having violated the visitor's code

of conduct. Id. at 183. He was given notice of the decision and advised of his right to have a hearing on that decision. Id. at 181. The record reflects that he did not elect to have a hearing. Without argument or evidence to the contrary, we cannot hold that Appellant was not provided procedural due process in this case.

Appellant next argues that the plain language of his complaint states a claim for a First Amendment violation. Again, a bald assertion without support does not provide this court with any argument that Appellant's First Amendment rights were violated. To the extent that Appellant argues that his speech was constitutionally protected, we cannot agree.

In order to prevail on his First Amendment claim, Appellant must show that (1) his speech relates to a matter of public concern, Connick v. Myers, 461 U.S. 138, 146, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983); and (2) his interest as a public employee n5 in commenting on the matter of public concern outweighs the interest of the government employer "in promoting the efficiency of the public services it performs through its employees," Pickering v. Board of Educ., 391 U.S. 563, 568, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968). Because Appellant's speech does not touch on a matter of public concern, we need not reach the second step of this analysis. See Connick, 461 U.S. at 146. In determining whether speech relates to a matter of public concern, we must consider the content, form, and context of a given statement, as revealed by the whole record. The court will also consider the motive of the speaker to learn if the speech was calculated to redress personal grievances or to address a broader public purpose. Workman v. Jordan, 32 F.3d 475, 482-83 (10th Cir. 1994)

("speech relating to internal personnel disputes is not regarded as a matter of public concern"); see also Schalk v. Gallemore, 906 F.2d 491, 495 (10th Cir. 1990) ("In drawing the thin line between a public employee's speech which touches on matters of public concern, and speech from the same employee which only deals with personal employment matters, we have looked to the subjective intent of the speaker.").

In order to analyze the character of Appellant's speech, it is important to recognize that the speech under scrutiny in this case is Appellant's grievance concerning Appellee Shahinpoor's alleged theft and misuse of his research material. The speech at issue is *not* the subject matter of the dissertation itself. Therefore, Appellant's lengthy citations to popular media and legal authority regarding the public nature of his dissertation *topic* are irrelevant. That the topic of the dissertation may relate to a matter of public concern is immaterial. A public employee's speech does not attain the status of public concern simply "because its subject matter could, in different circumstances, have been the topic of a communication to the public that might be of general interest." Connick, 461 U.S. at 148 n.8. To receive First Amendment protection, "what is actually said on that topic must itself be of public concern." Wilson v. City of Littleton, Colorado, 732 F.2d 765, 769 (10th Cir. 1984) (while death of police officer could conceivably be topic of general interest to public, personal feeling of grief regarding that death is not matter of public concern).

Appellant never spoke on the public nature of the alleged diversion. He was concerned solely about the theft and conversion of his research, his "baby." See Aplt. App. at 212. It is in Appellant's motive - to

redress the alleged conversion - that the character of his speech is revealed as personal rather than public. Appellant "did not seek to inform the public" of any "actual or potential wrongdoing." See Connick, 461 U.S. at 148. Instead, Appellant's grievance concerned personal redress for the theft of what he considered to be his intellectual property. Speech on matters calculated to redress a personal grievance does not involve a matter of public concern.

Appellant believes that his case is similar to Luethje v. Peavine Sch. Dist. of Adair County, 872 F.2d 352 (10th Cir. 1989), and Chandler v. City of Arvada, Colorado, 292 F.3d 1236 (10th Cir. 2002). These cases are inapposite. The Luethje court held that a rule prohibiting cafeteria workers from speaking with anyone but the principal about cafeteria practices, along with implied threats of adverse employment action, impermissibly placed a restraint on an employee's speech. The court stated that "[a cafeteria worker's] complaints about unsanitary practices in the school's cafeteria and the administration's refusal to address them clearly dealt with matters of public concern." Id. at 355. The Chandler court held that speech in recall petitions which sought "to achieve political change in Colorado" was "core political speech." Id. Neither the law nor the facts in either case have any relevance to our case. Appellant "was lobbying for redress of purely personal grievances involving the alleged theft and misuse of his thesis materials." Aplt. App. at 309. Appellant never spoke on the public nature of the alleged diversion. He was concerned with the alleged theft of what he considered to be his intellectual property - purely a private interest.

Appellant's attempt to elevate his speech to that deserving constitutional protection by alluding to weapons development and terrorism also fails. We agree with the district court that[Appellant's] contention that fraudulent or illegal use of the information of his thesis could have possible ramifications for terrorism and methods of mass destruction [] does not elevate his grievances into constitutionally protected activity. Any practical use that could eventually result from [Appellant's] thesis material is incidental to the question of whether his *grievances* on its alleged misuse are constitutionally protected activities.Id. at 309-10 (emphasis in original).

The district court correctly determined that Appellant's concern was the "perceived theft of material toward which he felt some proprietary interest," the motives for which were "clearly personal and emotional." Aplt. App. at 255 (citing Workman, 32 F.3d at 483). As such, the court did not err in granting Appellees' motions to dismiss as to the First Amendment claims because Appellant's speech was not constitutionally protected.

Appellant's single paragraph in his brief which alleges that UNM Appellees conspired and acted in concert to deprive him of his constitutional rights based at least in part on his race/national origin (Iranian) has no support in the record. See Aplt. Br. at 27. "[A] conspiracy[] requires the combination of two or more persons acting in concert." Brever v. Rockwell Int'l Corp., 40 F.3d 1119, 1126 (10th Cir. 1994) (quoting Abercrombie v. City of Catoosa, 896 F.2d 1228, 1230 (10th Cir. 1990)) (internal quotations omitted). In order to plead a conspiracy claim, "[a] plaintiff must allege, either by

direct or circumstantial evidence, a meeting of the minds or agreement among the defendants." Id. (quoting Abercrombie, 896 F.2d at 1231) (internal quotations omitted).

Appellant cites to his Affidavit as support for his conspiracy claim. Aplt. Br. at 27. However, the Affidavit contains only conclusory allegations that "in agreement with each other, none of the [UNM Appellees]" questioned the actions of or took any action against the other UNM Appellees concerning Appellant's grievance. Aplt. App. at 152-57, 159. These unsupported assertions are not enough to overcome summary judgment. That individual UNM Appellees failed to take action against other UNM Appellees does not evidence agreement and concerted action. Parallel action - or inaction in our case - does not necessarily indicate an agreement to act in concert. See, e.g., Cayman Exploration Corp. v. United Gas Pipe Line Co., 873 F.2d 1357, 1361 (10th Cir. 1989) (citing Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541, 98 L. Ed. 273, 74 S. Ct. 257 (1954)) ("even conscious parallel business behavior, standing alone, is insufficient to prove conspiracy"). As correctly stated by the district court, "these facts concern [Appellant's] dissatisfaction with the way his grievance was handled, which are not cognizable as a constitutional claim." Aplt. App. at 253. Appellant's conspiracy claim was appropriately dismissed because he failed to set forth evidence of an agreement and concerted action on the part of the Appellees. Additionally, Appellant did not set forth evidence of racial or class-based discriminatory animus as part of his conspiracy argument. His statement that "the manner in which [Appellee] Shahinpoor manipulated the system at UNM

against me, and the manner in which [UNM Appellees] allowed this to happen [leads to the conclusion] that my being Iranian was a significant and motivating factor in how I was treated," has no support in the record. Id. at 159.

AFFIRMED.

Footnotes

n1 "UNM Appellees" include Mr. Firoozbakhsh (Visiting Orthopedic Professor at UNM), Mr. Thompson (Professor and Chairman of UNM Department of Mechanical Engineering), Mr. Boeglin (UNM Dean of Students), Regents of UNM. "Appellees" include UNM Appellees and Appellee Shahinpoor, Appellant's former academic advisor.

n2 Appellant does not address whether the district court erred in granting UNM Appellees' motion to dismiss as to Appellant's failure-to-train-and-supervise claim. As such, we will not address it on appeal.

n3 The district court construed Appellant's whistle blowing retaliation claim as a claim for retaliatory discharge for exercising his First Amendment right to free speech.

n4 The district court granted Appellee Shahinpoor's Motion to Dismiss based on the law of the case doctrine because of its prior decision granting summary judgment to UNM Appellees based on qualified immunity. Aplt. App. at 247-56, 306-12; see United States v. Platero, 72 F.3d 806, 810 (10th Cir. 1995) (when court decides upon rule of law, decision should

continue to govern same issues in subsequent stages of case).

n5 Appellant conceded at oral argument that the asserted protected speech was made in the context of his status as a public employee while he was receiving his doctoral thesis at UNM. Appellant's counsel stated that "the trial court seems to have used the employee analysis [in evaluating Appellant's First Amendment claim.]" Oral Argument, January 12, 2004. He further stated that "we do not take issue with using [the employee analysis,] we think it makes sense," reasoning that "[graduate students] work under University faculty members and they get some stipend or payment." Id.

No. 02-2314
(D.C. No. CIV-00-1791 WPJ/LFG)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KARIM SALEHPOOR,
Plaintiff-Appellant,

v.

MOHSEN SHAHINPOOR; KEYKHOSROW FIROOZBAKHSH; DAVID E. THOMPSON; REGENTS OF THE UNIVERSITY OF NEW MEXICO; and RANDY G. BOEGLIN, individually and in their official capacities,
Defendants-Appellees.

JUDGMENT

Filed February 18, 2004

Before EBEL, McKAY and LUCERO, Circuit Judges.

This case originated in the District of New Mexico and was argued by counsel. The judgment of that court is affirmed.

Entered for the Court

PATRICK FISHER, Clerk

by:
Deputy Clerk

Civil No. 00-1791 WJ/LFG-ACE

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

KARIM SALEHPOOR,
Plaintiff,

v.

MOSHEN SHAHINPOOR, Individually and in his Official Capacity; KEYKHOSROW FIROOZBAKHSH, Individually and in his Official Capacity; DAVID E. THOMPSON, Individually and in his Official Capacity; RANDY G. BOEGLIN, Individually and in his Official Capacity; REGENTS OF THE UNIVERSITY OF NEW MEXICO and ENVIRONMENTAL ROBOTS INCORPORATED, A New Mexico Corporation,
Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court upon a Motion to Dismiss for Failure to State a Claim and on the Basis of Qualified Immunity, filed by Defendants Firoozbakhsh, Thompson and Boeglin on December 5, 2001 (Doc. 46). Having considered the parties' briefs and the applicable law, I find that Defendants' motion is well-taken and will be granted.

During the time relevant to the complaint, Plaintiff was a candidate for a doctoral degree in Mechanical Engineering at the University of New Mexico ("UNM") Mechanical Engineering Department. His graduate research, which concerned the mechanism of actuation

for electrically controllable artificial muscles, was funded through federal grant money, specifically by the Jet Propulsion Lab ("JPL") at the National Aeronautics and Space Administration ("NASA"), and by Sandia National Laboratory.n1 Prior to the defense of his Ph.D. dissertation, Plaintiff alleges that he discovered and reported to UNM authorities that Shahinpoor, who was his academic advisor, illegally converted Plaintiff's research material for the benefit of his own corporation, Environmental Robotics, Inc. Plaintiff also claimed that Defendant Shahinpoor gave this information to a visiting professor at the Orthopedic Department at UNM Hospital, who in turn transferred it to a graduate student in Tehran, Iran, for use in that student's thesis.n2

Plaintiff alleges that following the submission of these grievances to the Dean of the School of Engineering, Shahinpoor set out on a course of offensive and prejudicial conduct towards Plaintiff concerning the defense and completion of his dissertation. Plaintiff contends that he was ultimately constructively discharged from the Ph.D. program and barred from the UNM campus without due process. He seeks compensatory and punitive damages as well injunctive relief for the various counts in the complaint: deprivation of property interests without due process; conspiracy to deprive him of his constitutional rights under 42 U.S.C. § 1985; failure to adequately train and supervise; whistleblowing retaliation; unjust enrichment; prima facie tort; conversion and defamation. Defendants Firoozbakhsh, Thompson and Boeglin move to dismiss Plaintiff's federal claims.

Legal Standards

Although the instant motion was styled as a motion to dismiss, in light of the parties' references to exhibits which were supplied by Plaintiff and the Court's inclusion of these materials in the analysis, the motion will be converted into one for summary judgment. See Lucero v. Gunter, 52 F.3d 874, 877 (10th Cir. 1995) (citation omitted) (motion to dismiss is treated as a motion for summary judgment when premised on materials outside the pleadings, and the opposing party is afforded the same notice and opportunity to respond as provided in Rule 56").

In determining claims of qualified immunity, the Court first determines whether the defendant's actions violated a constitutional or statutory right, and second, whether the right was so clearly established that a reasonable person would have known that his conduct violated that right. Albright v. Rodriguez, 51 F.3d 1531, 1534-45 (10th Cir. 1995). In order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point; or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains. Harris v. Robinson, 273 F.3d 927, 931 (10th Cir. 2001) (citation omitted). Once the plaintiff meets this twofold burden, the public official then assumes the usual summary judgment movant's burden of showing that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law. Hinton v. City of Elwood, Kan., 997 F.2d 774, 779 (10th Cir. 1993) (cited in Howard v. Dickerson, 34 F.3d 978 (10th Cir. 1994); Fed.R.Civ.P. 56(c).n3

Deprivation of Property Interests Without Due Process

Plaintiffs complaint is devoid of specifics regarding what due process rights were violated by Defendants' actions. At any rate, his claims fail under theories of both substantive and procedural due process. Defendants correctly note that Plaintiff has no property right as to his other areas of concern, such as right to a temporary advisor, an office, or being free from having to do a second dissertation defense. Further, it was not clearly established at the time of the underlying incidents that Plaintiff had a substantive property interest in continuing his doctoral studies. See Archuleta v. Colo. Dept. of Institutions, 936 F.2d 483, 489 n.6, 490 (10th Cir. 1991) (majority assuming without deciding that student had substantive property interest in enrollment) (citing Regents of Univ. of Michigan v. Ewing, 474 U.S. 214 (1985). On the facts presented, Defendants did not act arbitrarily in responding either to Plaintiff's s grievances regarding Shahinpoor's alleged misuse of Plaintiff research or in his conduct which eventually led to his expulsion. See Id. (finding that school had not acted arbitrarily where property right was not a fundamental right, even assuming student had a property interest in enrollment); Gossett v. Okla., 245 F.3d 1172, 1181 (10th Cir. 2001)(plaintiff asserting a substantive due process claim based on an academic decision must show that the decision was the product of arbitrary state action rather than a conscientious, careful and deliberate exercise of professional judgment).

It was, however, clearly established at the time of the alleged incidents, that Plaintiff had a right to pursue his doctoral studies such that he was entitled to procedural due process prior to being barred from the program. Gossett v. Okla., 245 F.3d 1172 (10th Cir. 2001) (property interest

in placement in nursing program established) (citing Harris v. Blake, 798 F.2d 419, 422 (10th Cir.1986); Goss v. Lopez, 419 U.S. 565 (1975) (recognizing a property interest in public education). Plaintiff disputes Defendants' contention that the expulsion was purely academic. A hearing is not required where a student is dismissed for academic reasons. The student must have prior notice of faculty dissatisfaction with his performance and of the possibility of dismissal, and the decision to dismiss the student must be "careful and deliberate." Trotter v. Regents of the Univ. of New Mexico, 219 F.3d 1179, 1184 (10th Cir. 2000) (relying on Bd. of Curators of the Univ. of Miss v. Horowitz, 435 U.S. 78, 90 (1978)). A review of Plaintiff's exhibits shows that ' - following a breakdown of communication between Plaintiff and Shahinpoor in the spring and summer of 1998, UNM nevertheless allowed him to continue under the guidance of another academic advisor. Pltff's Exs. 1 and 2.

However, even taking on Plaintiff's characterization; of the events as disciplinary, I find that he was afforded all the procedure required. Plaintiff's expulsion actually occurred as a result of his conduct over the span of several months which UNM authorities viewed as "erratic, threatening and bizarre." Ex. 8 at 3. This behavior included Plaintiff shouting and becoming "extremely agitated," particularly when referring to his allegations against Defendant Shahinpoor, interfering with visitors to the department. Ex. 4, 1, Ex. 5. Defendant Thompson, who was the Chairman of the Mechanical Engineering Department, stated that Plaintiff's behavior had "degenerated" over several months, Ex. 8 at 1, to where it was considered to be "well beyond acceptable behavior" and "potentially

violent." Ex. 8 at 2-3. Plaintiff was notified that as a result of his inability to control his "actions and emotions," he would be prevented from continuing any activities on the UNM campus. He was also given, in writing, an opportunity to request an informal hearing. Exs. 10 & 11. I find that Defendants afforded Plaintiff all the due process to which he was entitled. See Cleveland Bd. of Educ v. Loudermill, 470 U.S. 532, 541 (1985) (an individual be given an opportunity for a hearing before he is deprived of any significant property interest); Hammock v. Keyes et al, 93 F.Supp. 2d 1222, 1227 (S.D. Ala.) (student facing longer suspensions or expulsion is due a higher standard of due process than one facing temporary suspension) (relying on Goss, 419 U.S. at 584).n4 Accordingly, Defendants are entitled to summary judgment on Plaintiff's due process claims.

Conspiracy Under 42 U.S.C. § 1985

Plaintiff's count of conspiracy is devoid of any specifics. The complaint alleges conspiracy based on Defendants' supporting and "collaborating" with Shahinpoor in an effort to expel Plaintiff from the graduate program and from his office, and denying him a temporary advisor while his grievance against Shahinpoor was under consideration. A conspiracy requires a combination of two or more persons acting in concert. Brever v. Rockwell Int'l Corp., 40 F.3d 1119, 1126 (10th Cir. 1994). In order to adequately plead a conspiracy, a plaintiff must allege, "either by direct or circumstantial evidence, a meeting of the minds or agreement among the defendants" which deprives the plaintiff of equal protection or equal privileges and immunities. Id. (quoting Abercrombie v. City of Catoosa, 896 F.2d 1228,

1231 (10th Cir. 1990)); Tilton v. Richardson, 6 F.3d 683, 686 (10th Cir. 1993) (citation omitted).

Unfortunately, the evidence Plaintiff offers in the form of exhibits strengthens Defendants' position on the conspiracy claim, leaving the allegations in the complaint as conclusory statements. For example, Defendant Thompson allegedly "collaborated" with Defendant Shahinpoor in barring Plaintiff from his office and denying hum a temporary advisor. However, the evidence shows that Thompson did in fact allow Plaintiff to continue for some time with another advisor. Exs. 1, 2, and that actions were taken to bar Plaintiff from his office as a result of the University's decision to terminate him from the program based on his conduct over the prior several months. Exs. 9, 10. Plaintiff attempts to create a conspiracy claim with certain facts recited within his affidavit. Affidavit, ¶ 9. However, these facts concern Plaintiff's dissatisfaction with the way his grievance was handled, which are not cognizable as a constitutional claim. See ' - Trotter, 219 F.3d at 1184; Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 92, n.8 (1978) (suggesting that a university's failure to follow its own academic rules does not, in itself, give rise to a constitutional violation). Nor do the facts support a claim under § 1985.n5 The most severe shortcoming in Plaintiff's conspiracy claim is that there is nothing in the complaint which can be inferred to be evidence of class-based or racially discriminatory motive.n6 Therefore, this claim should be dismissed.

Failure to Adequately Train and Supervise

Plaintiff attempts to hold the UNM Regents, and Defendants Thompson and Boeglin liable on a failure to train and supervise Defendants' Shahinpoor and Firoozbakhsh. However, without a viable underlying constitutional claim, Plaintiff cannot prevail on this claim. See Apodaca v. Rio Arriba County Sheriff's Dept., 905 F.2d 1445, 1447 (10th Cir. 1990) (citing City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986)) (a municipality may not be held liable where there is no underlying constitutional violation by any of its officers).

Whistleblowing Retaliation (First Amendment)

I construe Plaintiff's First Amendment claim, raised for the first time as such in his response, as Count IV ("whistleblowing retaliation"). This claims fails on the threshold question of whether Plaintiff was engaged in speech that should be afforded constitutional protection. To prevail on a claim that he was discharged in retaliation for exercising his constitutionally- protected right to freedom of speech, a plaintiff must prove that (1) the speech is protected under the First Amendment and (2) the speech was a substantial or motivating factor in the Defendant's decision to terminate plaintiff's employment. Conaway v. Smith, 853 F.2d 789, 795 (10th Cir.1988) (citing Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)).

Speech is protected under the First Amendment only when (1) the speech relates to matters of public concern, Connick v. Myers, 461 U.S. 138, 146 (1983); and

(2) the interests of the public employee in commenting on matters of public concern outweigh the interest of the government employer "in promoting the efficiency of the public services it performs through its employees," Pickering v. Board of Education, 391 U.S. 563, 568 (1968).n7 Speech which discloses any evidence of corruption, impropriety or other malfeasance on the part of city officials in terms of content clearly concerns matter of public import. Conaway, 853 F.2d at 793. This law was clearly established at the time of the alleged incidents. Plaintiff's claim cannot survive because he has not alleged a viable claim under the First Amendment.

Plaintiff seeks protection for speech in connection with the grievances he filed against Defendant Shahinpoor for unauthorized use of his research material. Plaintiffs characterization of his speech in his affidavit as relating to possible national security issues does not necessarily raise the nature of his grievances against Defendant Shahinpoor to a level of public concern which would require a balancing inquiry.n8 The speech under scrutiny here is Plaintiff's grievances concerning Defendant Shahinpoor's theft and misuse of the material, not the subject matter of the dissertation thesis itself. See Workman v. Jordan, 32 F.3d 475, 483 (10th Cir. 1994), cert denied, 514 U. S. 1015 (1995) (testimony that disclosed the sheriffs department's tolerance of a sexist environment, although touched upon a matter of public concern, related to internal personnel disputes), in reacting to the perceived theft of material toward which he felt some proprietary interest, Plaintiff's motives in bringing the grievances were clearly personal and emotional. Workman v. Jordan, 32 F.3d 475, 483 (10th Cir. 1994) (subjective

motive of the speaker is an important factor in determining whether the speech was calculated to redress personal grievances or to address a broader public purpose). For example, at one point, Plaintiff compares the stolen material to a "baby ... being stolen by some persons in front of their eyes." Ex. 15 at 21. In this case, Plaintiff's speech clearly embraced "personal disputes and grievances with no relevance to the public interests." Conaway, 853 F.2d at 796; see Gardetto v. Mason, 100 F.3d 803, 812 (10th Cir. 1996). The subject matter and context of the grievances was limited to a dispute which Plaintiff wanted settled between himself and Defendant Shahinpoor. Curtis v. Oklahoma City Pub. Schools Bd. Of Educ., 147 F.3d 1200, 1212 (10th Cir.1998) (speech concerning individual personnel disputes or internal policies will typically not involve public concern"). Because Plaintiff's speech, upon which he stakes a claim for First Amendment redress, is not entitled to constitutional protection, this claim will be dismissed.

Conclusion

Based on the aforegoing reasons, Defendants Firoozbakhsh, Thompson and Boeglin are entitled to dismissal of all of Plaintiff's federal claims: Fourteenth Amendment Due Process; 42 U.S.C. § 1985; Failure to Train and Supervise; and First Amendment ("Whistleblowing Retaliation").

THEREFORE,

IT IS ORDERED that Defendants Firoozbakhsh, Thompson and Boeglin's Motion to Dismiss for Failure

to State a Claim and on the Basis of Qualified Immunity (Doc. 46), is hereby GRANTED.

UNITED STATES DISTRICT JUDGE

Footnotes

n1 The research was apparently of some critical importance for Mars missions planned by NASA. Plaintiff points to this fact as the reason why the JPL supported Plaintiff's application for Permanent Resident status in the United States, based on the National Interest Waiver.

n2 Shahinpoor allegedly took Plaintiff's actuation mechanism and in effect "traded" it to a graduate student named Shavandi in exchange for using the mathematical section of Shavandi's thesis in ERI's report to a national funding agency.

n3 I also note that the grounds for dismissal argued by Defendants is alternatively based on failure to state a claim, which bypasses the need to analyze the claim on a qualified immunity defense. See Sanchez v. Sanchez et al., 777 F.Supp. 906, 916 (D.N.M. 1991) (one who has done no wrong has no need for any kind of immunity).

n4 Plaintiff does not allege any constitutional defects within the hearing provided; in fact, there is no indication that he availed himself of the opportunity to schedule a hearing.

n5 Plaintiff states his dissatisfaction with different parts of the grievance procedure, then simply states "In

agreement with each other. . . ." Such a statement does not in itself create a cause of action under § 1985.

n6 Plaintiffs response curtly announces that Plaintiff "clearly alleges that he was targeted in large part because of his Iranian heritage. Resp. at 20. Aside from the fact that Count II does not appear to allege this, Plaintiff's exhibits do not alleviate the bareness of the allegations.

n7 If the employee's speech does not touch on a matter of public concern, the court need not engage in the Pickering balancing analysis. Connick, 461 U.S. at 146.

n8 Plaintiff states in his affidavit that it is "feasible that "Artificial Muscles could be used as part of the triggering mechanism for many types of weapons." Affidavit, ¶11.

Civil No. 00-1791 WJ/LFG-ACE

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

KARIM SALEHPOOR,
Plaintiff,

v.

MOSHEN SHAHINPOOR, Individually and in his Official Capacity; KEYKHOSROW FIROOZBAKHSH, Individually and in his Official Capacity; DAVID E. THOMPSON, Individually and in his Official Capacity; RANDY G. BOEGLIN, Individually and in his Official Capacity; REGENTS OF THE UNIVERSITY OF NEW MEXICO and ENVIRONMENTAL ROBOTS INCORPORATED, A New Mexico Corporation,
Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court upon Defendant Shahinpoor's Motion to Dismiss, filed July 30, 2002 (Doc. 107), and Plaintiff's Motion to Amend First Amended Complaint by Interlineation, filed June 7, 2002 (Doc. 99). For reasons stated below, Defendant's motion will be granted, and Plaintiff's motion will be denied. Background Plaintiff was a candidate for a doctoral degree in Mechanical Engineering at the University of New Mexico ("UNM") Mechanical Engineering Department. His graduate research, which involved the mechanism of actuation for electrically controllable artificial muscles, was funded through federal grant money.n1 Plaintiff claims that Defendant

Shahinpoor, who was his academic advisor, illegally converted Plaintiff's intellectual property for the benefit of his own corporation, Environmental Robotics, Inc. He further alleges that Defendant Shahinpoor gave this information to a visiting professor at the Orthopedic Department at UNM Hospital, who in turn transferred it to a student in Tehran, Iran, for use in the student's graduate thesis. Plaintiff contends that as a result of Plaintiffs complaints and his submission of grievances concerning Defendants' misuse of his research information, Defendants allegedly set out on a course to deprive Plaintiff of his rights, ending up in constructively discharging him from the Ph.D. program and in barring him from the UNM campus without due process. The Complaint contains various federal and state law claims: Deprivation of Property Interests without Due Process (Count I); Conspiracy to deprive Plaintiff of Constitutional Rights under 42 U.S.C. § 1985 (Count II); Failure to Adequately Train and Supervise (Count 111); Whistleblowing Retaliation (construed as First Amendment) (Count IV); Unjust Enrichment (Count V); Prima Facie Tort (Count VI); Conversion (Count VII) and Defamation (Count VIII).

On June 11, 2002,1 dismissed with prejudice all of Plaintiff's federal claims against Defendants Firoozbakhsh, Thompson and Boeglin. Doc. 101 ("June 11th Opinion and Order"). Federal claims in Counts I, II and IV (due process, conspiracy and whistleblowing) remain against Defendant Shahinpoor, who now moves to dismiss pursuant to preclusion doctrines based on this Court's previous findings in the case.

Legal Standards

When a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. U.S. v. Platero, 72 F.3d 806, 810 (10th Cir. 1995) (citing Christianson v. Colt Industries Operating Corp., 486 U.S. 800, 817, 108 S.Ct. 2166, 2178, 100 L.Ed.2d 811 (1988)). Plaintiff urges the Court to view the motion under a summary judgment standard because a consideration of matters outside the pleadings is necessary.

I have already considered and addressed these matters in the June 11th Opinion and Order; where I determined that Plaintiff had not presented evidence sufficient to assert the violation of constitutional rights which would withstand dismissal.n2 Plaintiff was unable to show that he had a substantive due process right in continuing his doctoral studies, or a right to either a temporary advisor, an office, or being free from having to do a second dissertation defense. June 11th Opinion and Order, at 5. Although Plaintiff had a property interest in education which was entitled to procedural due process, the evidence showed that he was afforded all the due process to which he was entitled. Id., at 5.n3 Plaintiff's allegations of conspiracy in Count II were merely conclusory. June 11th Opinion and Order, at. 5.

Count IV, construed as a First Amendment claim, was dismissed on the basis that Plaintiff's speech was not protected and thus he could not claim constitutional protection.n4 Taking another shot at his First Amendment ("whistleblowing") claim, Plaintiff relies on Chandler v. City of Arvada, Colo, 292 F.3d 1236 (10th

Cir. 2002) for the proposition that his grievances are analogous to the referendum or recall petitions circulated by plaintiffs in Chandler and which were found to concern "core political speech" because in that case the speech sought "to achieve political change in Colorado." 292 F.3d at 1240. No such import attaches to the facts here, where Plaintiff was lobbying for redress of purely personal grievances involving the alleged theft and misuse of his thesis material.n5 Plaintiff urges the Court to accept Chandler as controlling authority which was decided subsequent to the June 11th Opinion and Order and thus qualifies as an exception to the law of the case doctrine. Greene v. Safeway Stores, Inc., 210 F.3d 1237 (10th Cir. 2000) (listing exceptions to law of the case doctrine). Because neither the facts nor the law set out in Chandler have a relevance to the present case, there is no reason not to follow my previous rulings.

Plaintiff's contention that fraudulent or illegal use of the information in his thesis could have possible ramifications for terrorism and methods of mass destruction, Resp. at 11, does not elevate his grievances into constitutionally protected activity, Any practical use that could eventually result from Plaintiffs thesis material is incidental to the question of whether his grievances on its alleged misuse are constitutionally protected activities. Wilson v. City of Littleton, 732 F.2d 765, 769 (10th Cir. 1984) (citing Connick v. Meyers, 461 U.S. 138, 148 n.8 (1983) (For speech to be considered "public concern," it is not enough that the subject matter could in certain circumstances be the topic of a communication to the public that might be of general interest; what is actually said on that topic must itself be of public concern).

Plaintiff points out, correctly, that the appropriate framework for assessing First Amendment claims against a non-employer defendant is Worrell v. Henry, 219 F.3d 1197 at 1212 (10th Cir. 2000). Analysis under the Worrell standard does not include the balancing inquiry conducted under Pickering v. Board of Educ., 391 U.S. 563, 568 (1968) for First Amendment claims in the employment context. Still, it requires a showing that plaintiff was engaged in "constitutionally protected activity" - a showing which Plaintiff's has not made based on the misuse of his dissertation thesis. Further, under an interpretation of the facts most favorable to Plaintiff (and even cloaking Plaintiff's actions with the mantle of constitutionally protected activity), Defendant's conduct did not cause Plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity. Despite overwhelming evidence that his behavior had become increasingly erratic and unacceptable, Plaintiff was allowed to continue his dissertation defense under a temporary advisor after communications broke down between himself and Shahinpoor. Over a span of several months, he was given written warning about his erratic and unacceptable behavior, and told in writing that he could request an informal hearing.n6

I find that under the law of the case doctrine, my previous findings in the June 11th Opinion and Order are applicable to Plaintiff's Counts I, II and IV against Defendant Shahinpoor. Plaintiff's response to the instant motion is essentially the same arguments presented in a different package. Therefore, Defendant's motion to dismiss will be granted.

Plaintiff's Motion to Amend

Plaintiff's motion to amend the First Amended Complain will not be granted. The amended complaint seeks to specifically add a First Amendment claim. Since I have already construed the Complaint to have alleged a First Amendment claim in Count IV, and dismissed that claim on its merits, there is no basis to allow Plaintiff's request. The amended complaint would also add a liberty interest claim under Count I. However, the Court's analysis of Plaintiff's s procedural due process claim based on an alleged property interest (right to continued enrollment) applies to a liberty interest as well. Although due process ordinarily requires an opportunity for "some kind of hearing" prior to the deprivation of a significant property interest, Miller v. Campbell County, 945 F.2d 348, 353 (10th Cir.1991) (quotation omitted), cert. denied, 502 U.S. 1096 (1992), Plaintiff has not demonstrated, or for that matter specifically alleged, either that he was not afforded a hearing, or that the process was deficient. Pitts v. Bd. of Educ of U.S.D. 305, Salina, Kansas, 869 F.2d 555, at 557 (10th Cir. 1989) (failure of plaintiff to permit defendant to provide any due process eliminates the claim). Therefore, Plaintiff's motion to amend is denied.

Final Disposition of Case - Defendant Environmental Robots, Inc. and State Claims

On June 6, 2002, I denied the motion to dismiss filed by Environment Robots, Inc. Doc. 95.n7 With Defendant Shahinpoor dismissed from this case, there remains no basis for the case to proceed in this forum_ With no federal claims pending in this action, I decline to

exercise supplemental jurisdiction over Plaintiff's state claims. 28 U.S.C. § 1367; City of Chicago v. International College of Surgeons, 522 U.S. 156, 172. (1997).

THEREFORE,

IT IS ORDERED that Defendant Shahinpoor's Motion to Dismiss (Doc. 107) is hereby. GRANTED;

IT IS FURTHER ORDERED that Plaintiff's Motion to Amend First Amended Complaint by Interlineation, (Doc. 99) is hereby DENIED;

IT IS FURTHER ORDERED that Defendant Environmental Robots, Inc. is hereby DISMISSED from the action for reasons stated above;

IT IS FINALLY ORDERED that Plaintiff's federal claims against all Defendants are DISMISSED WITH PREJUDICE and the above-captioned case is dismissed in its entirety.

UNITED STATES DISTRICT JUDGE

Footnotes

n1 The grant was funded by the Jet Propulsion Lab ("JPL") at the National Aeronautics and Space Administration ("NASA"), and by Sandia National Laboratory.

n2 The analysis therefore did not go further than the first prong of a qualified immunity analysis, on which the other Defendants' motion was based. _See

Saucier v. Katz, 533 U.S. 194, 201 (2001) (If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity). I made alternative findings as well, e.g., that the law was not clearly established as to whether Plaintiff had a substantive property interest in continuing his doctoral studies. June I 11th Opinion and Order, at 4.

n3 My analysis was based on the dual assumption that Plaintiffs expulsion was for academic and disciplinary reasons.

n4 Count III, Failure to Adequately Train and Supervise, was not alleged against Defendant Shahinpoor.

n5 Plaintiff alleged that Shahinpoor "broke into [his] office and desk drawer and took research materials that Plaintiff was using," Compl., ¶ 63, that Shahinpoor had used Plaintiff's dissertation thesis in a thesis he presented in Tehran, Iran, Compl., ¶ 50, and that Defendant had also used the contents of a thesis "identical" to Plaintiffs as a basis to obtain a grant for Shahinpoor's private company, Environmental Robots Inc. (a Defendant in this case), Compl. ¶ 53.

n6 Other than setting forth generalized notions of entitlement to procedural due process, both in his Complaint and in his response to the other Defendants' motion to dismiss, Plaintiff has not alleged deficiencies in the process he was afforded. Doc. 57 at 12. In fact, there is no indication that Plaintiff ever availed himself of a hearing. See June 11th Opinion and Order, at 6, n.4.

n7 According to the allegations, Defendant Shahinpoor owned Environmental Robots, Inc. ("E.R.I."). I denied the motion to dismiss, finding E.R.I. was not improperly or untimely added as party, considering the pro se status of Plaintiff at the time the original Complaint was filed. I also determined that the allegations pertaining to E.R.I. were sufficient to support a conversion claim. Since I am declining to exercise federal jurisdiction over the pending state claims, E.R.I. is no longer a Defendant in the present action.

Civil No. 00-1791 WJ/LFG-ACE

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

KARIM SALEHPOOR,
Plaintiff,

v.

MOSHEN SHAHINPOOR, Individually and in his Official Capacity; KEYKHOSROW FIROOZBAKHSH, Individually and in his Official Capacity; DAVID E. THOMPSON, Individually and in his Official Capacity; RANDY G. BOEGLIN, Individually and in his Official Capacity; REGENTS OF THE UNIVERSITY OF NEW MEXICO and ENVIRONMENTAL ROBOTS INCORPORATED, A New Mexico Corporation,
Defendants.

JUDGMENT

THIS MATTER came before the Court upon Defendant Shahinpoor's Motion to Dismiss, filed July 30, 2002 (Doc. 107), and Plaintiffs Motion to Amend First Amended Complaint by Interlineation, filed June 7, 2002 (Doc. 99). Pursuant to the findings and conclusions set forth in the Memorandum Opinion and Order which accompanies this Rule 58 Judgment;

IT IS THEREFORE ORDERED and ADJUDGED that Defendant Shahinpoor's Motion to Dismiss (Doc. 107) is hereby GRANTED;

IT IS FURTHER ORDERED that Plaintiff's Motion to Amend First Amended Complaint by Interlineation, (Doc. 99) is hereby DENIED;

IT IS FURTHER ORDERED that Defendant Environmental Robots, Inc. is hereby DISMISSED from the action for reasons stated above;

IT IS FINALLY ORDERED that Plaintiff's federal claims against all Defendants are DISMISSED WITH PREJUDICE and the above-captioned case is dismissed in its entirety.

UNITED STATES DISTRICT JUDGE

(1)

Supreme Court, U.S.
FILED
MAY 17 2004
OFFICE OF THE CLERK

No. 03-1557

In the Supreme Court of the United States

KARIM SALEHPOOR,

Petitioner,

v.

MOSHEN SHAHINPOOR, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TERRILL E. PIERCE
Counsel of Record

BROWN AND GERMAN
3909 JUAN TABO, NE
ALBUQUERQUE, NM 87111
(505) 292-9676
(505) 292-9680 FAX

Counsel for Respondents

Becker Gallagher Legal Publishing, Inc.
800.890.5001

QUESTIONS PRESENTED

Respondent submits that the Questions Presented are more accurately phrased as follows:

- Whether a doctoral student's grievance regarding alleged misappropriation of his dissertation research by his advisor constitutes speech of public concern worthy of First Amendment protection?

- Whether there can be any due process violation where a former student was provided notice of the concerns regarding his erratic and disruptive behavior as a visitor on the campus, and refused to avail himself of a proffered hearing regarding same?

- Whether a plaintiff who chose to submit materials outside of the pleadings for the Court's review, which the Court chose to review thereby converting a FRCP 12(b)(6) motion into one for summary judgment under FRCP 56, can defeat summary judgment by continuing to rely solely on the allegations in his Complaint?

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STATEMENT OF THE CASE

Petitioner's Statement of the Case is an exact duplicate, word for word (other than the label applied to himself, e.g., Mr. Salehpoor vs. Plaintiff vs. Appellant, and his brief description of subsequent proceedings), of his Statement of the Case to the District Court, and his Statement of the Case to the Tenth Circuit, except that it omits his introductory phrase used therein: "The following is taken from the First Amended Complaint filed herein." As indeed it is, word for word, a restatement of his complaint. But the allegations of Petitioner's complaint are of little relevance, as addressed in the Argument below, given that, in response to Defendants' Motion to Dismiss, Petitioner chose to submit voluminous materials outside of the pleadings, which the District Court considered in its ruling, thereby converting it to a Motion for Summary Judgment pursuant to FRCP 12(b)(6). (Pet., p. 18a) Indeed, the Tenth Circuit clearly explained this to Petitioner, and yet he persists in this Court to make the same mistake. (Pet., pp. 4a-5a)

Petitioner's First Amended Complaint alleged numerous state and federal claims: deprivation of property interests without due process; conspiracy to deprive him of his constitutional rights under 42 U.S.C. 1985; failure to adequately train and supervise; whistle-blowing retaliation (which in Petitioner's Response to the Motion to Dismiss he clarified was a First Amendment retaliation claim); unjust enrichment; prima facie tort; conversion and defamation. (Pet., pp. 17a, and 23a)

The District Court held that Respondents were entitled to qualified immunity on the first claim because, although the complaint was devoid of specifics regarding what due process rights were violated, any substantive due process claim failed

because it was not clearly established that Petitioner had any substantive property interest, and in any event, "Defendants did not act arbitrarily in responding either to Plaintiff's grievances regarding Shahinpoor's alleged misuse of Plaintiff's research or in his conduct which eventually led to his expulsion." (Pet., p. 19a) As to procedural due process, the District Court found that Petitioner was provided notice and given the opportunity to request an informal hearing, *which he never did*, so, assuming he was due a certain amount of process, he received it. (Pet., p. 21a) As to the conspiracy claim, the District Court found that, once again, the complaint was "devoid of any specifics", that the evidence proferred by Petitioner only "strengthens Defendants' position", and that there was nothing in the complaint from which evidence of class-based or racially discriminatory motive could be inferred. (Pet., pp. 21a-22a) The "failure to train and supervise" claim was dismissed because there was no "viable underlying constitutional claim." (Pet., p. 23a) Finally, the District Court concluded that Petitioner's grievances, the "speech" in question, concerned solely the alleged misappropriation of his dissertation material by his advisor, not the subject matter of the dissertation thesis itself, as to which Petitioner's motives were "clearly personal and emotional", and hence not protected speech for purposes of his First Amendment claim. (Pet., pp. 24a-25a) Once the federal claims were dismissed, the District Court declined to exercise jurisdiction over the state law claims. (Pet. App., pp. 3a-4a, 33a-34a) Petitioner appealed the dismissal of the federal claims. (Pet., p. 3a)

Far from rubberstamping the District Court's detailed opinion, on appeal the Tenth Circuit conducted its own thorough analysis of the record, noting its frustration with the conclusory nature of Petitioner's brief, and the utter lack of factual citation therein. (Pet., p. 5a) The Court of Appeals

provided its own citations to the materials provided by Petitioner in the record regarding the lack of factual underpinnings for Petitioner's claims, observing that: Petitioner was no longer enrolled as a student after the Spring semester of 1998 and therefore his status was as a visitor; he chose to file a grievance, which was taken seriously and investigated, the process was completed, including an appeal, but no merit was found to his allegations; he was even offered a liaison to assist in the completion of his dissertation; he was barred from the campus only after his conduct had become increasingly disruptive, confrontational and abusive; he was provided notice of this decision, and advised of his right to a hearing, which he elected not to have; and in his grievance he was "concerned solely about the theft and conversion of his research, his 'baby.'" (Pet., pp. 2a-3a, and 7a-9a) As to his conspiracy claim, the Court of Appeals explained that Petitioner cited to his Affidavit, but that it contained only conclusory allegations. (Pet., pp. 12a-13a) The Court noted that Petitioner had failed to address the District Court's dismissal of the failure-to-train-and-supervise claim, so it was not addressed on appeal. (Pet., p. 13a, n.2) Based on the foregoing undisputed facts, the Court of Appeals affirmed the District Court's judgment for Respondents.

OPPOSITION TO REASONS FOR GRANTING THE WRIT

The entirety of Petitioner's Reasons For Granting The Writ is an exact duplicate of his Argument in his brief to the Tenth Circuit, again, literally word for word, adding only an occasional conclusionary sentence, and changing the headings. Why Petitioner would have chosen to proceed in this way is inexplicable, but it does explain why the Reasons are generally incomprehensible in context; they simply are not, and have nothing to do with, reasons for granting a writ

of certiorari to the Supreme Court. Perhaps this is because Petitioner well knew that he could not meet any of the criteria this Court has provided as reasons for granting certiorari. Supreme Court Rule 10. Respondents submit that Petitioner has failed to present "with accuracy, brevity and clarity" what is essential to a ready and adequate understanding of the points requiring consideration, which is itself a sufficient reason for this Court to deny the Petition. Supreme Court Rule 14.4.

While the facts underlying Petitioner's claims are unusual, involving bizarre conduct that required a university to take the unusual step of barring him from the campus, his legal issues could not be more commonplace. As indicated by the necessary restatement provided herein of the Questions Presented, there is nothing compelling, or even interesting, about the legal issues involved, each of which consists of long settled law that does not even require clarification.

Based on Petitioner's Questions Presented, he is seeking to appeal only his First Amendment claim, and his procedural due process claim, and he challenges whether the Tenth Circuit's opinion adequately conducted a *de novo* review of same. Two of the Questions Presented are mere argument as to what Petitioner's motive was in bringing his grievance complaining about his doctoral advisor's alleged misappropriation of Petitioner's dissertation research material. There is no argument about the applicable legal standard (Pet., pp. 8a-10a, citing Connick v. Myers, 461 U.S. 138, 146, 148 & n.8, 103 S. Ct. 1684, 75 L.Ed.2d 708 (1983)), only the application of the uncontested legal standard to the undisputed facts herein.

The other two Questions Presented, and much of the stated Reasons to Grant the Writ, are premised on a gross

misstatement of the facts. For example, one of his Questions Presented seeks to determine the due process applicable to "a graduate student." But, as the Tenth Circuit explained, Petitioner ceased being a student at the end of the spring semester in 1998; from that time forward, his status on campus was as a mere visitor. (Pet., pp. 2a-3a, 7a-8a) The remaining Question Presented queries whether "de novo review of First Amendment issues requires something other than mere appellate court recital and adoption of findings made by the trial court." Petitioner never addresses this in his Reasons, and understandably so, given that one can only scratch one's head as to what he might have argued. Why in the world would a de novo review necessarily require something more? But even more to the point, this can hardly be an issue in the instant case, where the appellate court obviously conducted its own searching examination of the record.

Even in Petitioner's Discussion of the Reasons for Granting the Writ, it is as though he is addressing an entirely different case, with a different set of facts. Thus, he begins with Sections addressing whether his complaint stated various causes of action, even though he is the one who submitted materials outside the pleadings in response to a Motion to Dismiss. Having chosen to place this evidence before the District Court, Petitioner now must live with the consequences. Consideration of these materials required the District Court to convert the motion to one for summary judgment pursuant to FRCP 12(b)(6), which in turn rendered the allegations of the complaint insufficient, given that the law is well settled that one cannot rest on the allegations of one's complaint to defeat summary judgment. (Pet., p. 5a, citing Panis v. Mission Hills Bank, N.A., 60 F.3d 1486, 1490 (10th Cir. 1995)) Further, this was not even an issue Petitioner challenged in the Tenth Circuit, nor to this Court.

Because the Petition is merely a restatement of his brief to the two lower courts, argument is included that has nothing to do with the Questions Presented, but such argument here, as in the lower courts, is so minimal that it is difficult to discern its import.

Petitioner repeatedly states that the well accepted legal standards for First Amendment and Due Process claims need to be "elucidated" by this Court, but he never explains why; indeed, his statement of the Reasons to grant this Writ are themselves an exercise in obfuscation. Again, perhaps this is because a clear statement of the issues only serves to evidence their well settled nature. In any event, "elucidation" of an already well established standard is simply not a basis for the granting of certiorari.

Further legal argument on Petitioner's contentions is more appropriately reserved for the briefing on the merits in the unlikely event that this Petition is granted. Respondents note only that the Tenth Circuit's resolution herein does not conflict with any known authority, certainly not with any identified by Petitioner. It does not involve any important federal question, nor does it depart in any sense from the accepted and usual course of judicial proceedings. Petitioner had a personal dispute with his doctoral advisor, which so overtook him that he acted irrationally, refusing to proceed with the avenues provided to him for obtaining his degree, and engaging in behavior so bizarre during the time period after he was no longer a student, but rather a mere visitor to the university, that he had to be barred from the campus. There is no reason whatsoever for granting this Petition for Writ of Certiorari.

CONCLUSION

For all of the foregoing reasons, this Court should deny certiorari herein.

Respectfully Submitted,

Terrill E. Pierce
Brown and German
3909 Juan Tabo, NE
Albuquerque, NM 87111
(505) 292-9676
(505) 292-9680 (Facsimile)
Counsel for Respondents